

IMMIGRATION ISSUES – Sanctuary Cities and Schools



**New Mexico School Boards Association
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Today's Discussions

- The Law As to Undocumented Students
- Current Status of Law
- ICE agents at School
 - What to do?
- “Sanctuary Jurisdictions”

Landmark decision: *Plyler v. Doe*, 457 U.S. 202 (1982)

- In *Plyler*, the U.S. Supreme Court held that under the Equal Protection Clause, Mexican school-aged children who had filed a class action suit, who could not establish that they were in this country legally, were entitled to the same free public education that was made available to other residents of the same school district, irrespective of their immigration status.

Landmark decision: *Plyler v. Doe*, 457 U.S. 202 (1982)

- “Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.”
- **This decision mirrored the practice in New Mexico – Certain school districts along the border have enrolled and educated students living in Mexican border communities for decades.**

Landmark decision: *Plyler v. Doe*, 457 U.S. 202 (1982)

- Under *Plyler*, schools should not take actions that would discourage enrollment and success of students, based on immigration status:
 - Do not ask about immigration status
 - Do not request or maintain records related to immigration status (i.e., birth certificates being used as proof of citizenship, as opposed to proof of age, Social Security Numbers, etc.)

Current State of the Law

- **ICE “Sensitive Location Enforcement” Policy**

In October 2011, ICE issued its “Sensitive Enforcement Location” policy, that “is meant to ensure that ICE officers and agents exercise sound judgment when enforcing federal law at or focused on sensitive locations” and make substantial efforts to avoid unnecessarily alarming local communities.

Current State of the Law

- **ICE “Sensitive Location Enforcement” Policy**

The policy is not intended to categorically prohibit lawful enforcement operations when there is an

- immediate need for enforcement action”
- Memorandum from John Morton, U.S. Immigration and Customs Enforcement Director, to Field Office Directors et al., Policy No. 10029.2 (Oct. 24, 2011), *available at* <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>

Current State of the Law

- **ICE “Sensitive Location Enforcement” Policy**
 - It is important to note that the “Sensitive Location” policy only applies to arrests, interviews, searches, and surveillance. “Actions not covered by this policy include actions such as obtaining records, documents and similar materials from officials or employees, providing notice to officials or employees, serving subpoenas....”

Current State of the Law

- **ICE “Sensitive Location Enforcement” Policy**
- “Schools” are defined in the policy as: “schools (including pre-schools, primary schools, secondary schools, post-secondary schools up to and including colleges and universities, and other institutions of learning such as vocational or trade schools);”
- Under this policy, “any planned enforcement action at or focused on a sensitive location ... must have prior approval” from senior DHS officials. However, the memorandum states that this “policy is not intended to categorically prohibit lawful enforcement operations when there is an immediate need for enforcement action”

Current State of the Law

- **ICE “Sensitive Location Enforcement” Policy**
- Exigent circumstances permitting enforcement action without such approval include:
 - national security or terrorism matter;
 - imminent risk of death, violence, or physical harm to any person or property;
 - immediate arrest or pursuit of a dangerous felon, terrorist suspect, or any other individual(s) that present an imminent danger to public safety; or
 - imminent risk of destruction of evidence material to an ongoing criminal case.

Executive Order: “Protecting the Homeland”

- In January 2017, President Trump issued an Executive Order that impacts immigration law enforcement: *“Enhancing Public Safety in the Interior of the United States.”**
- Federal government will increase enforcement efforts against “removable aliens”
- Federal government "shall ensure that [sanctuary] jurisdictions ... are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes..."

*Executive Order 13768 of January 25, 2017, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8,799 (Jan. 30, 2017). A federal judge in San Francisco entered a permanent injunction in this matter on November 20, 2017. Available at <http://www.ktvu.com/news/federal-judge-permanently-blocks-trump-sanctuary-cities-order>

Executive Order: “Protecting the Homeland”

- Under this Administration’s Executive Order, “*Enhancing Public Safety in the Interior of the United States*,” jurisdictions deemed by the Attorney General or the DHS Secretary to have willfully refused to comply with 8 U.S.C. 1373 will not be eligible for federal grants.

Section 1373 relates to the sharing of information between governmental entities and the INS regarding an individual’s citizenship or immigration status.

Department of Homeland Security Implementation Orders

- On February 21, 2017, DHS issued comprehensive policy guidance implementing the Executive Orders, signaling more intensive law enforcement:
- Elimination of most of the previously exempt categories for enforcement
- “Sparing” use of parole in lieu of detention and only in the case of “demonstrated urgent humanitarian reasons or significant public benefit”
- Higher level of proof for asylum claims
- Elimination of privacy rights for immigration proceedings
- Goal of rapid resolution of immigration matters
- Significant new resources for enforcement agents and detention centers

Department of Homeland Security Implementation Orders

- Check statutes, regulations, and state education guidance.
- Inform students and families about how to report.
- Take concerns seriously and investigate promptly.
- If harassment is found, take effective remedial action.
- When First Amendment issues come into play, be ready to navigate carefully and seek legal guidance.
- If concerns arise, be prepared for media attention and potential legal action.

What to Do When ICE Comes to School

- **Release of Education Records**

- FERPA generally prohibits release of student education records without prior parental consent

- No exception that clearly applies to ICE enforcement

activities, nor does it fall into a health and safety emergency under 34 C.F.R. § 99.36; see NMSA 1978 Sections 32A-4-3E and 29-1-8, but you should be aware of the state law mandates of these two statutes.

- Designated directory information may be released without parental consent (34 C.F.R. § 99.31(a)) (FERPA **does not require** disclosure)

- Current district practice regarding release of directory information may only apply to local law enforcement

- Decide what practice your district will follow for federal agents, and clearly communicate to your site administrators

Release of Education Records - Subpoenas

- Schools must produce education records in response to a subpoena, but FERPA requires a “reasonable effort” to notify parents in advance of the school’s compliance, so that the parent (or eligible student) “may seek protective action”. 34 C.F.R. § 99.31(a)(9)(ii).
- It is strongly suggested that school staff have a process in place that directs all subpoenas to central office for processing to ensure consistent response in accordance with local school board policies and state law.

Student Interviews by ICE Agents

- Review policies and practices regarding making students available to law enforcement during the school day. Does your district have a current policy on “cooperation with law enforcement.”
- Update training of administrators, front office and teaching staff on the responses to law enforcement when they appear unannounced at school.
- Formal or informal agreements with local law enforcement may not apply to federal agents.
- Significant risk in not providing prior notice to parents of law enforcement interviews, except in cases of child abuse, imminent harm, or warrant.

Student Interviews by ICE Agents

- If an ICE agent comes to school seeking to interview a student, best practice is for school staff to take agent's contact information and tell him/her that someone will be in touch promptly.
- Schools should not release student information or make students available for interview on the spot.
- School should not confirm that student is in attendance.



Implications for Agreements with Security Resource Officers (SROs)

Given the relationships between police departments and school districts regarding SROs, it may be wise to review agreements between your district and local SROs, so there is understanding about the respective roles and responsibilities.

ICE Agent Compliance Checks in SEVIS program

- For schools that are in the SEVIS program*, front office staff should be trained to know that ICE agents can come on to campus **without** a warrant or subpoena and get information specific to those students in the SEVIS program.
- This is part of the school's compliance with the SEVIS program.

* Memorandum from U.S. Immigration and Customs Enforcement, U.S. Dep't of Homeland Security, to All SEVIS Users, No. I 703-05 (Mar. 14, 2017), *available at* <https://www.ice.gov/doclib/sevis/pdf/bcmI703-05.pdf>.

DACA

- DACA, Deferred Action for Childhood Arrivals, is an immigration policy established during the Obama Administration in June 2012.
- Children who were brought to the U.S. as minors by their parents can apply for DACA status, and, as such, are granted protection from deportation, so long as they meet certain requirements.

DACA

- On September 5, 2017, the new Administration terminated the DACA program.
<https://www.nbcnews.com/politics/immigration/trump-dreamers-daca-immigration-announcement-n798686>
- Under the plan, announced by Attorney General Jeff Sessions, the Trump administration will stop considering new applications for legal status, but will allow any DACA recipients with a permit set to expire before March 5, 2018, the opportunity to apply for a two-year renewal if they apply by October 5.
- Note, however, several states, including New Mexico, filed a lawsuit in New York federal court to stop the decision on September 6, 2017.

What is a “Sanctuary” School District?

- Under the Executive Order, “*Enhancing Public Safety in the Interior of the United States*,” the current Administration specifically identifies “sanctuary jurisdictions” as those that may lose eligibility for federal grants.
- However, there is no common definition of a “sanctuary” jurisdiction. It depends on the jurisdiction and context.
- This is a political term in the vernacular, but not a legal term of art, and means different things to different people.

What is a “Sanctuary” School District?

- For school districts, the term is commonly applied when the district has proactively stated it will take some or all of the following actions:
- not provide student or family information to ICE agents, except as required by law
- establish procedural safeguards for ICE agents engaging at school or with students
- take other actions to support immigrant students

“Sanctuary” School District Designations

- Self-Designated “Sanctuary” School Districts
- School Board Adoption of Resolution (Re)Affirming Protecting All Students
- School Districts Making a Public Statement
- School Districts That Choose to Make No Such Designation

“Sanctuary” School District Designations

- A major concern with such a designation is that the term “sanctuary” may convey more power to protect students and families than schools actually have.
- That said, the DHS Orders do not address sanctuary jurisdictions.
- From a public relations perspective, what does your school district gain by labeling itself as a “sanctuary” district? Think about this designation, politically versus constitutionally.

Do “Sanctuary” Schools Risk Loss of Federal Funds?

- At first glance of the Executive Order, only federal grants related to law enforcement seem to be implicated.
- If the Executive Order is read broadly, this is a very complex question under Tenth Amendment.
- It is generally understood that the federal government cannot require states to assist with federal law enforcement.
- Most federal funds for schools come through congressional appropriation.
- Substantive changes would require congressional approval.

Challenges to “Sanctuary Sanctions”

- *City and County of San Francisco v. Trump*, Case No. 3:17-cv-00485-WHO (N.D. Cal.).
- *County of Santa Clara v. Trump*, Case No. 5-17-cv-00574 (N.D. Cal.); 2017 WL 1459081, *County of Santa Clara v. Trump*, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017)
- On April 25, 2017, a federal judge issued a nationwide injunction against the President’s January 25th Executive Order, prohibiting the withholding of federal funds from jurisdictions that refuse to cooperate with immigration authorities.

What To Do

- Communicate and Be Prepared!!
- Consider Plyler – broad constitutional mandate
- Locate and determine district policy
- Communicate to students and families
AND YOUR SCHOOL LAWYERS!
- Respond to concerns and keep documentation
- Prepare in advance for media coverage

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